Supreme Court, U.S.
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No. 95-1228

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY E. WELLS AND KENNETH R. STEELE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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1. Our petition presents the question whether the materiality of the false statement or report is an element of 18 U.S.C. 1014, which imposes criminal penalties on a person who "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. Respondents claim (Br. in Opp. 6-8) that that question is not properly before this Court because the government did not raise it in a timely manner in the court of appeals. Rather, respondents note (*id.* at 5) that the government described respondents' false statements as material in the indictment in this case, and first argued that materiality was not an element of the Section 1014

offense after the court of appeals, on June 22, 1995, requested supplemental briefing regarding the effect of this Court's June 19, 1995, decision in *United States* v. *Gaudin*, 115 S. Ct. 2310.

As an initial matter, this Court's traditional rule "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992). "That rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Ibid.*; see also *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). That rule is sensible, because when a court of appeals has announced a legal principle of general applicability, it has established governing law for future cases in its jurisdiction. A decision by such a court on an issue of law *is* fairly presented for review, whether or not it was "pressed" by a party. And there can be no doubt that the court of appeals in this case squarely decided the legal issue of whether materiality is an element of Section 1014 in a fashion that will bind courts in all Section 1014 prosecutions in the Eighth Circuit.

In any event, respondents' claim of untimeliness is without merit. As we discussed in our petition, before *Gaudin*, the question whether materiality was an element of Section 1014 was of little practical importance because, under the existing precedent in the Eighth Circuit and almost every other circuit, questions of materiality were decided by the trial judge, not the jury, and district judges routinely found the materiality element to have been established. Pet. 13-14; see *United States* v. *Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990). The government accordingly did not have any occasion or need to contest the holding of the majority of courts of appeals that materiality was an element of the Section 1014 offense.

After respondents were convicted and appealed, the government again did not have occasion to raise that issue in its initial brief on appeal. Respondents, for their part, did not claim that it was error for the district court to resolve the materiality issue itself. See Respondents' Supplemental Letter Brief at 4 (July 5, 1995) ("because of the existing law in this circuit, the issue was not briefed" in respondents' opening and reply briefs).[1] Only after the court of appeals directed the parties to brief the effect of *Gaudin* did respondents raise that claim; the government properly replied that there was no error under *Gaudin*, because materiality is not an element of the Section 1014 offense. Thus, there was nothing untimely about the government's submission. Nor did the court of appeals suggest that it was untimely; the court, after receiving the supplemental briefs of the parties, addressed the issue and reversed respondents' convictions based on its holding that materiality is an element of the Section 1014 offense. See Pet. App. 10a-14a.

Respondents are also mistaken in claiming (Br. in Opp. 7) that under the "invited error" doctrine, the government may not assert that materiality is not an

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[1] Respondents' sole argument with regard to materiality in their initial court of appeals brief was that the evidence of materiality was insufficient. The government responded that respondents' false statements regarding their service obligations with customers and regarding their wives' personal loan guarantees were material to the banks' decisions to extend loans to them. The court of appeals agreed that those false statements were material. See Pet. App. 16a-18a.

element of Section 1014. That doctrine provides that a party "may not complain on appeal" of errors that the party itself invited or encouraged the trial court to commit. See *United States* v. *Sharpe*, 996 F.2d 125, 129 (6th Cir.), cert. denied, 114 S. Ct. 400 (1993). The government did not "complain on appeal," and does not now claim, that the trial court erred. It is respondents, not the government, who contend that the trial court erred by not submitting the issue of materiality to the jury. The government can defend the district court's judgment on the ground that materiality is not an element of the Section 1014 offense, because an appellate court may affirm a trial court's ruling on any ground apparent from the record. *United States* v. *Alzanki*, 54 F.3d 994, 1008 (1st Cir. 1995), cert. denied, 116 S. Ct. 909 (1996); *United States* v. *Blake*, 941 F.2d 334, 339 (5th Cir. 1991), cert. denied, 506 U.S. 998 (1992); see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n.7 (1984).

Respondents, finally, err in relying (Br. in Opp. 6) on the fact that the indictment described respondents' false statements as material. The district court is not obliged to instruct the jury that, to convict, it must find each of the facts alleged in the indictment to have been established beyond a reasonable doubt. Rather, the district court is permitted to delete surplusage not essential to the charge, and "[a] part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as 'a useless averment' that 'may be ignored.'" *United States* v. *Miller*, 471 U.S. 130, 136 (1985), quoting *Ford* v. *United States*, 273 U.S. 593, 602 (1927); see *United States* v. *Restrepo-Contreras*, 942 F.2d 96, 98 (1st Cir. 1991) (where there was no statu-

tory requirement that the government establish as an element a defendant's specific intent as alleged in the indictment, no proof was required of that allegation), cert. denied, 502 U.S. 1066 (1992).[2]

2. On the merits, respondents mistakenly claim (Br. in Opp. 9-10) that the holding in *Gaudin* resolves the issue presented by the petition in this case. The issue before this Court in *Gaudin* was whether, when materiality is an element of a crime, it must be decided by the jury rather than the judge. The Court in *Gaudin* did not consider whether materiality is an element of 18 U.S.C. 1014, a statute that was not at issue in that case.[3]

Respondents also suggest (Br. in Opp. 10) that the petition should be denied because this Court has granted certiorari, vacated the judgment, and remanded several cases for reconsideration in light of *Gaudin*. Respondents note that one of those cases, *Waldron* v. *United States*, 116 S. Ct. 333 (1995), involved a prosecution under Section 1014. The Fifth

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[2] *Stirone* v. *United States*, 361 U.S. 212 (1960), on which respondents rely (Br. in Opp. 7), is inapposite. In *Stirone*, the trial court improperly added "a new basis for conviction" in its instructions that was different from the basis of the charge set out in the indictment. 361 U.S. at 217. The district court here did not commit that error when it removed the surplus description of respondents' false statements as material in its instructions to the jury. As for *United States* v. *Camp*, 541 F.2d 737 (8th Cir. 1976) (Br. in Opp. 7), it merely stated the fundamental principle that an indictment must allege all the essential elements of an offense.

[3] The statute at issue in *Gaudin* was 18 U.S.C. 1001. The government did not contest that materiality was an element of the clause of Section 1001 charged in that case, see 115 S. Ct. at 2313, and the Court did not address that issue in its decision. *Id.* at 2320-2321 (Rehnquist, C.J., concurring).

Circuit issued its decision in *Waldron* before *Gaudin* was decided, and it was therefore appropriate for this Court to remand the case to permit the court of appeals to address in the first instance any issues raised by the *Gaudin* decision. By contrast, the court of appeals' decision in this case expressly considered and resolved, in light of *Gaudin*, the question whether the materiality of the false statement is an independent element of Section 1014. The issue is therefore properly presented for determination in this Court.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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